BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Seventh Circuit Court of Appeals on the previous appeal by the same respondents holding that the Peer Manor Building Corporation was not a legal entity which could be reorganized under Chapter X, is fully reported in 134 F. (2d) 839. The findings and conclusions of the District Court on the second petition to reorganize the debtor under Chapter X appear in this record (R. 63). The opinion of the Seventh Circuit Court of Appeals reversing the order of the District Court dismissing the proceedings for want of jurisdiction on the ground that the Peer Manor Building Corporation was an unincorporated company which could be reorganized under Chapter X, is not yet reported and appears in the record at page 74.

Jurisdiction of This Court.

The decision of the Circuit Court of Appeals reversing the order below with directions to proceed with reorganization of the debtor under Chapter X was decided on June 16, 1944 (R. 74). The petitions for rehearing were denied on July 13, 1944 (R. 115). Jurisdiction of this court is invoked under Judicial Code Section 240 (a), 28 U. S. C. A. Section 347 (a) as amended by the Act of February 13, 1925.

A Statement of the Case.

The Peer Manor Building Corporation, an Illinois corporation, was dissolved on June 18, 1934, by a decree entered in the State Court.

Notwithstanding the dissolution, on July 23, 1936, more than two years after the dissolution, two of the officers in

the name of the corporation, filed a petition under Section 77 B of the Bankruptcy Act, and secured an extension of the time of payment of a first mortgage bond issue which had been signed by the corporation's predecessor in title. In connection with the reorganization and as part of the plan, the same two officers, purporting to act on behalf of an existing *de jure* corporation, executed a chattel mortgage and a trust agreement to safeguard performance of the plan of extension. The operation and management of the apartment hotel, the only property owned by the corporation, was turned over to Petitioner J. Marshall Peer, the secretary of the corporation, at the time of its dissolution. He managed the property, collected the rents, paid bills and each month turned over the net rentals to the Indenture Trustee, together with a monthly report, which was signed in the name of the corporation, by himself as secretary. There were never any shareholders' meetings after 1934. Peer was subjected to no control by any shareholder and never accounted to the stockholders.

Then on December 5, 1941, the extension period having expired, the respondents, first mortgage bondholders, together with the Indenture Trustee, filed a petition seeking to reorganize the property under Chapter X of the Bankruptcy Act, as amended.

The petition was approved, a trustee was appointed, and a plan of reorganization confirmed.

An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. The court reversed the orders of the District Court, and held that an Illinois Corporation dissolved for more than two years could not be proceeded against under Chapter X (134 F. 2d 839). The basis for the decision was the opinion of this court in *In re 4136 Wilcox Bldg. Corp.* (302 U. S. 120) to the effect that under Illinois law a corporation dissolved for more than two

years ceases to exist for the purpose of filing a voluntary petition for reorganization. The language of the Illinois Statute prohibiting suits by or against a corporation dissolved for more than two years, was construed by the majority of the court to be a bar to *involuntary* bankruptcy proceedings against the dissolved corporation. The majority of the court, in order to make clear that involuntary proceedings were, in view of the *Wilcox* case, to be on the same basis as voluntary proceedings, overruled a line of cases in which it had held that creditors could proceed against the dissolved corporation, especially where all the shareholders were before the court.

Mr. Justice Evans filed a dissenting opinion in which he contended that the debtor was a *de facto* corporation, and therefore amenable to the provisions of the Bankruptcy Act.

The majority of the court said that only corporations can be reorganized under Chapter X and that the court had no jurisdiction to proceed "because the alleged debtor was no longer in esse. There was no corporation to be reorganized."

The respondents filed a petition for rehearing and also a petition for Writ of Certiorari, contending that the debtor could be reorganized under Chapter X as an unincorporated company, urging in their petition for a Writ of Certiorari, filed in this court, that the court had disregarded the provision relating to "unincorporated companies and associations."

This court evidently disagreed with this contention when it denied the petition for a Writ of Certiorari on June 21, 1943 (320 U. S. 211).

Within two weeks, on July 8, 1943, the respondents, the same creditors, filed a petition against the Peer Manor Building Corporation, calling it an "unincorporated com-

pany", seeking to resurrect the dead corporation for the purpose of reorganizing it under Chapter X of the Bankruptcy Act.

The District Court, after hearing evidence, found that the Peer Manor Building Corporation was not an unincorporated company, and was not subject to reorganization under Chapter X, and further that the decision on the first appeal (134 Fed. 2d 839) that the Peer Manor Building Corporation could not be proceeded against under Chapter X, constituted a bar to the new proceeding. The District Court therefore ordered the petition for reorganization dismissed (R. 63-64).

Upon appeal, the Circuit Court of Appeals reversed the order of the District Court, held that the debtor could be reorganized under Chapter X, and that the adjudication on the previous appeal did not bar the new action (R. 74).

This new opinion was written by Judge Evans who had so vigorously dissented on the former appeal. Two of the judges who in the first decision had held that the Peer Manor Building Corporation could not be resurrected, now joined with Judge Evans in holding that the Peer Manor Building Corporation could be reorganized as an unincorporated company, thereby nullifying the effect of their own decision and the denial of certiorari by this court.

Specification of Errors To Be Urged.

The Circuit Court of Appeals erred:

1. In overruling the decision of the District Court that the judgment on the previous appeal that the debtor could not be reorganized under Chapter X, constituted an adjudication and a complete bar to the new proceedings instituted by the same persons and it clearly erred when it reversed the order dismissing the proceedings and directed the proceedings to be reinstated.

2. In holding that a corporation which was dissolved by the decree of a State Court and whose officers continued to conduct its corporate business in defiance of the state law and who are made personally liable for their acts under the Illinois law, may, by their illegal acts, create or establish an unincorporated company and thereby become a corporation for reorganization purposes under Chapter X.

3. In disregarding the Illinois law that unincorporated companies are deemed to be unlimited partnerships, and in holding that the debtor as an unincorporated company may be reorganized under Chapter X, which expressly excludes unlimited partnerships from the Act.

4. In holding that a corporation which was dissolved by judicial decree and which is neither a *de jure* nor a *de facto* corporation, constituted an "unincorporated company" although no persons ever associated themselves to organize such a company.

5. In holding that after petitioning creditors who invoked the jurisdiction of a court of Bankruptcy and who obtained an adjudication against the bankrupt, may, within two weeks after the reversal of the adjudication, again invoke the jurisdiction of the Bankruptcy court to obtain another adjudication against the debtor.

6. In disregarding the findings of fact of the District Court which saw and heard the witnesses, and in failing to follow Rule 52 making the findings binding on the reviewing court, unless clearly erroneous.

SUMMARY OF THE ARGUMENT.

I.

THE DECISION ON THE FORMER APPEAL THAT THE PEER MANOR BUILDING CORPORATION COULD NOT BE REORGANIZED UNDER CHAPTER X WAS A COMPLETE BAR TO THIS ACTION.

(a) The defense of *res adjudicata* was properly sustained because there was the identity of parties, subject matter and relief.

(b) The defense of *res adjudicata* is not only applicable to the issues which were raised and decided, but also to all issues that might have been raised.

II.

THE FINDINGS OF FACT BY THE DISTRICT COURT THAT THE PEER MANOR BUILDING CORPORATION WAS NOT AN UNINCORPORATED COMPANY WERE BINDING ON THE COURT OF APPEALS AND IT WAS ITS DUTY TO FOLLOW RULE 52, WHICH IT FAILED TO DO.

III.

AN UNINCORPORATED COMPANY CONSTITUTES A PARTNERSHIP WHOSE MEMBERS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE ILLINOIS LAW, AND SUCH A PARTNERSHIP DOES NOT CONSTITUTE A CORPORATION UNDER CHAPTER X.

(a) Partnerships whose members are individually liable are not corporations under Chapter X.

(b) An unincorporated company is a partnership whose members are jointly and severally liable under the Illinois law.

IV.

A CORPORATION WHICH WAS DISSOLVED BY A JUDICIAL DECREE AND WHICH CONTINUED TO FUNCTION UNDER THE CORPORATE NAME IS NEITHER A DE FACTO CORPORATION NOR AN UNINCORPORATED COMPANY AND THE STATUS OF THE PERSONS WHO CONDUCT ITS AFFAIRS UNDER THE CORPORATE NAME IS THAT OF INDIVIDUALS WHO ARE PERSONALLY LIABLE FOR THEIR ACTS.

(a) Upon the expiration of the two-year period from the dissolution of the corporation, the title vested in the individual stockholders not as members of an unincorporated company but as tenants in common.

(b) A corporation dissolved by decree of court may not conduct its business in the corporate name as an unincorporated company.

(c) Illinois does not recognize the existence of unincorporated companies as legal entities and such companies must be sued in the name of the individuals who compose them.

V.

THE DECISION IS IN CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT CONSTRUING SECTION 1(8) THAT THERE CAN BE NO UNINCORPORATED COMPANY WITHOUT ANY ACT ON THE PART OF ANY PERSONS TO FORM SUCH A COMPANY.

(a) The two officers of the corporation who continued to execute documents in the corporate name after its dissolution were personally liable for their acts under Section 157.150 of the Illinois Corporation Act, and their illegal acts did not transform the dissolved corporation into a legal unincorporated company.

(b) In the absence of persons associating themselves for the conduct of a business as an association or an unincorporated company, there was no association or unincorporated company as defined in the Bankruptcy Act capable of reorganization under Chapter X.

VI.

PETITIONING CREDITORS HAD BURDEN OF PROVING THERE WAS A CORPORATION WITHIN THE MEANING OF CHAPTER X.

(a) There can be no reorganization proceedings under Chapter X for liquidation purposes only.

(b) When the debtor is without any legal or equitable interest in the property, it is not subject to reorganization under Chapter X.

VII.

THE BANKRUPTCY COURT HAD NO JURISDICTION BECAUSE ALLEGED DEBTOR HAD NO PROPERTY WHICH COULD BE THE SUBJECT OF REORGANIZATION UNDER CHAPTER X, AND AS AN ENTITY COULD HOLD NO TITLE UNDER ILLINOIS LAW.

(a) The petitioning creditors had the burden of proof to sustain the jurisdictional requirements under Chapter X which they failed to do as found by the District Court.

(b) There was no proof that the individuals and corporations which were alleged to have associated themselves as members of the unincorporated company ever did become members of an unincorporated company, and the court properly found that the material allegations of the petition were not sustained by the proof.

(c) The findings of the trial court on controverted factual questions were binding and conclusive on the Court of Appeals.

ARGUMENT.

I.

THE DECISION ON THE FORMER APPEAL THAT THE PEER MANOR BUILDING CORPORATION COULD NOT BE REORGANIZED UNDER CHAPTER X WAS A COMPLETE BAR TO THIS ACTION.

On the question whether a dissolved corporation could be reorganized under Chapter X, there was a clash between the "majority" of the court and the "minority". Judge Minton in writing the opinion for the court said (134 F. (2) 839) at page 841:

> "We therefore hold that since the corporation sought to be reorganized on the petition of the creditors had been dissolved for more than seven years before the filing of the petition herein on December 5, 1941, which fact was properly before the court, the court was without jurisdiction of a party to be reorganized and without jurisdiction of a subject for reorganization. * * * The State of Illinois has the power of life and death over its corporations. It says the corporation is dead. We know of no rule of bankruptcy which has the power of resurrection."

The opposite view was expressed by Judge Evans in his dissenting opinion, wherein he said at page 843:

> "Unless the Illinois statute finally and completely seals the existence of the corporation by dissolution, the creditors should not be barred. The Illinois statute, as I read it, does not completely terminate the corporation's existence. The Corporation is not completely dissolved. It is not wholly dead. It lives for some purposes—to perform some affirmative acts, protective of its creditors. It is a *de facto* corporation so far as creditors' attempting to reach its assets is concerned. *Life Assn. of America* v. *Fassett*, 102 Ill. 315.
>
> "It is not so dead as to prevent creditors, seeking

to protect their rights under the Reorganization Act, from reorganizing it and its estate as the legitimate subject of reorganization. In short, it is a *de facto* corporation for a limited purpose."

The majority of the court, however, *did not agree with him and held that the corporation could not be resurrected.*

In their petition for certiorari filed in this court, respondents urged at page 15 under the heading: "The respondent debtor is a corporation within the meaning of Section 1, Subparagraph 8 of the Bankruptcy Act" that under this section the definition "unincorporated companies and associations, and any business conducted by a trustee" includes the Peer Manor Building Corporation. They also urged:

> "In the case at bar the debtor had conducted a business for seven years at least as a corporation after the dissolution proceedings and was continuing to do so; it had held itself out as a corporation: it had acted through a corporate structure, whether authorized or not; its officers, purporting to act for a corporate entity, had physical possession of valuable property, managed it, collected large sums of money therefrom, paid out large operation expenses, interest, and taxes. It is clear that they did not do these acts in their own right as individuals. They purported to hold for a corporate entity. If that entity had ceased to exist, then they must have held in trust for the creditors or the beneficiaries of that entity, or both, and must have operated the business for those beneficiaries."

They further urged (p. 17):

> "The statutory definition does not limit corporations for purposes of voluntary bankruptcy to those constituted corporations under sanction of some state law or relying on the exercise of the power of a state to create or continue a corporate existence, else there would have been no need for the words, 'unincorporated companies and associations and any business conducted by a trustee' in the statute."

After the denial of their petition for certiorari by this court (320 U. S. 211), and the decision of the District Court upon the evidence in the case that the judgment of the Court of Appeals was a complete bar to the new action commenced by the same parties against the same parties seeking the identical relief, Judge Evans now wrote the opinion of the court, wherein he held that Sec. 1 (8) of Title 11, brings the Peer Manor Building Corporation within the act.

The District Court in sustaining the defense of *res judicata* made the following findings:

1. The question of jurisdiction herein involved is the same question as was involved in the proceeding entitled, Peer Manor Building Corporation, a corporation, Debtor, in the United States Circuit Court of Appeals, for the Seventh Circuit, Case No. 8098.
2. The evidence does not show that there is here an association, individuals, or corporation, as are required for parties against whom an involuntary petition may be filed under the Bankruptcy Act.

These findings were based on evidence heard in open court and on the legal principles announced by the Seventh Circuit Court of Appeals in its decision on the previous appeal taken by the respondents when it reversed the District Court which entered a decree for the reorganization of the debtor under Chapter X. The Court of Appeals held (134 F. (2) 839):

> "For another reason the court was without jurisdiction to proceed, because the second essential element was lacking. It could not proceed under Chapter X of the Bankruptcy Act unless it had before it a corporation, as only corporations can be reorganized under this Chapter. This was a jurisdictional fact that did not exist and could not exist because the alleged debtor corporation was no longer in ease. There was no corporation to be reorganized."

Among the evidence tending to sustain the defense of *res judicata* there was introduced in evidence the petition for certiorari which was filed by the respondents in this court when they sought to review the decision of the Court of Appeals. This petition urged, among other things, the following:

> "The Court of Appeals for the Seventh Circuit erred in that it failed to give any consideration to the statute made and provided defining a corporation for the purpose of bankruptcy to include 'unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instruments' ";

This petition was denied by this court on June 21, 1943.

After holding in the previous opinion that the court knew of "no rule of bankruptcy which has the power of resurrection" the respondents *resurrected* the corporation, within one month after the pronouncement of death sentence by the denial of certiorari. The judge who wrote the dissenting opinion on the former appeal (wherein he held that a corporation was not "so dead as to prevent creditors, seeking to protect their rights under the Reorganization Act, from reorganizing it," and that it was "a *de facto* corporation," and *with whom the majority of the court then clashed and held to the contrary*), now wrote the opinion in the instant case reaching the *opposite conclusion* and holding that the corporation was the proper subject of reorganization under Chapter X.

In discussing the question of *res judicata*, the court stated (R. 75) that it was satisfied that the decision on the former appeal was not an adjudication because "the parties were not the same; the evidence was not the same; nor was the issue the same". The court completely overlooked that the defense of *res judicata* is *not* overcome by

the fact (1) that the evidence may be different, nor (2) that the issues may be different. A defense of *res judicata* is sustained when it contains the elements (1) identity of parties, (2) of subject matter, and (3) the relief. (*City of Chicago* v. *Partridge*, 248 Ill. 442.) The *subject matter* on the former appeal was *the reorganization of the debtor*, the Peer Manor Building Corporation. This is the *same subject matter* that is involved on this appeal. The *claim* was based on the *same bonds* which were held by the *same petitioners* on the prior appeal. The same property was sought to be reorganized. There is, therefore: (1) *identity* of the parties, (2) subject matter, and (3) the relief. The fact that additional parties were added is of no importance. (*Goumaris* v. *Pavlakas*, 202 Ill. App. 268.) **The matter was adjudicated between these petitioners and the respondents and may not be relitigated.** A defense of *res judicata* is applicable, not only to the issues that were adjudicated, but all issues that might have been adjudicated. (*Barry* v. *Commonwealth Edison Co.*, 374 Ill. 473; *Skolnik* v. *Petella*, 376 Ill. 500, citing *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.) *Res judicata* applies not only to the matters that were litigated, but to the matters which might have been litigated. (*People ex-rel Modern Woodmen of America* v. *Circuit Court*, 347 Ill. 34.) The law of *res judicata* is not limited to the issues actually involved or determined, but extends to every other matter which might have been raised and decided. (*People ex-rel De Cola* v. *United States Fidelity & Guaranty Co.*, 306 Ill. App. 518; *Bowles* v. *Capitol Packing Co.*, 143 F. (2) 87, 89.)

The identical question was decided in *Reihm* v. *Clough-Reihm Co.*, 234 Ill. App. 199. There a suit in chancery was filed to establish a resulting trust pertaining to certain real estate. The plaintiff failed in his suit and he filed a new suit claiming relief against the same property on a different theory. In deciding that the judgment in

the first case was a bar to the second case, the Appellate Court relied on the decision in *Beloit* v. *Morgan*, 7 Wall, 619 and it quoted the following from a decision of the Supreme Court of Illinois:

> "There was identity of parties and subject-matter in the two suits, and the rule is, that in such a case the question which was in issue and judicially passed upon and determined in the first suit is conclusively settled by the judgment and cannot be again litigated in another action between the same parties. (*Noyes* v. *Kern*, 94 Ill. 521; *Hanna* v. *Read*, 102 Ill. 596; *Wright* v. *Griffey*, 147 Ill. 496; *Louisville, N. A. & C. Ry. Co.* v. *Carson*, 169 Ill. 247; *People* v. *Hill*, 182 Ill. 425.) A complainant must present all the grounds showing his right to the relief prayed for which could have been presented, and if he does not, he will not be allowed in a second suit to take advantage of the omission. All questions relating to the same subject-matter which were open to consideration and could have been presented are conclusively settled, whether they were presented or not. (*Bailey* v. *Bailey*, 115 Ill. 551; *Harmon* v. *Auditor of Public Accounts*, 123 Ill. 122; *Lusk* v. *City of Chicago*, 211 Ill. 183.) The former judgment must be upon the merits, but a judgment on demurrer 'is as conclusive as a judgment from a finding of the facts alleged in the bill.' (*Nicpel* v. *Laparle*, 74 Ill. 306.)"

The court further said:

> "'The general rule is, that where a second action is based upon the same claim and demand as a former suit, the judgment in the former suit, if rendered upon the merits, is an absolute bar to the subsequent action, and as to such claim concludes both parties and privies, not only as to every ground of recovery or defense actually presented, but also as to every ground which might have been presented in the former suit. (*Anderson* v. *West Chicago St. R. Co.*, 200 Ill. 329; *Marie M. E. Church* v. *Trinity M. E. Church*, 253 Ill. 21.)'
>
> "To such an unbroken line of authorities, both in

> the earlier and later cases, this court cannot do otherwise than adhere."

Furthermore, the issue that this was an unincorporated company was made and decided on the former appeal. The petition for rehearing filed in said cause relied on the same statutory provision on which this court now based its opinion (R. 24). In the petition for certiorari which was filed in this court (R. 25), the respondents said (R. 26):

> "The statutory definition does not limit corporations for purposes of involuntary bankruptcy to those constituted corporations under sanction of some state law but refers to **unincorporated companies** and associations."

It is evident that the *identical* issue was raised and adjudicated by the court in the former appeal (134 F. (2) 839). It was adjudicated by this court when it denied certiorari (320 U. S. 211).

II.

THE FINDINGS OF FACT BY THE DISTRICT COURT THAT THE PEER MANOR BUILDING CORPORATION WAS NOT AN UNINCORPORATED COMPANY WERE BINDING ON THE COURT OF APPEALS AND IT WAS ITS DUTY TO FOLLOW RULE 52, WHICH IT FAILED TO DO.

The District Court heard the evidence in open court (R. 29-63). After hearing the oral testimony and examining the exhibits it filed its "Findings of Fact" under Rule 52 (R. 63) that the Peer Manor Building Corporation was "not unincorporated company" or "association". These findings were binding on the Court of Appeals and it was its duty to accept the findings as true under Rule 52 (*Saco-Lowell Shops* v. *Reynolds*, 141 Fed. (2) 587; *Schwarz* v. *Witwer Grocer Co.*, 141 Fed. (2) 341). The Court of Appeals clearly erred when it refused to follow the Rule and reversed the District Court on factual issues which were binding on it.

III.

AN UNINCORPORATED COMPANY CONSTITUTES A PARTNERSHIP WHOSE MEMBERS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE ILLINOIS LAW, AND SUCH A PARTNERSHIP DOES NOT CONSTITUTE A CORPORATION UNDER CHAPTER X.

The conclusion of this court that the debtor, the Peer Manor Building Corporation, was an unincorporated company within Section 1 (8) and 506 (3) of Title 11, is fundamentally wrong because under the Illinois law *unincorporated companies constitute partnerships*, whose members are individually and jointly and personally liable for the debts of the co-partnership, and such a partnership is *excluded* by Chapter X of the Bankruptcy Act. (See *Pope & Cottlle Co.* v. *Fairbanks Realty Co.*, 124 F. (2) 132, 135, construing the meaning of "unincorporated company" under Chapter X.)

(a) Partnerships whose members are individually liable are not corporations under Chapter X.

The opinion (p. 4) quotes Section 1(8) of Title 11, defining corporations under the Bankruptcy Act which includes "partnership associations organized under laws *making the capital subscribed alone responsible for the debts of the association.*" (Emphasis ours.) A partnership whose members are individually liable is, therefore, *excluded* under this section.

(b) An unincorporated company is a partnership whose members are jointly and severally liable under the Illinois law.

If it be true, as the court held, that the Peer Manor Building Corporation is an *unincorporated company*, then it was a *partnership* whose members are jointly and individually liable (*Hodgsen* v. *Baldwin*, 65 Ill. 532, 538) and

therefore it is *not a corporation* within the meaning of Chapter X.

In *Pilsen Brewing Co.* v. *Wallace*, 291 Ill. 59, the court referred to the status of unincorporated companies and the liability of its members. It said (p. 62):

> "If a liability existed it was *not statutory* but arose from a failure to comply with the provisions of another act authorizing changing the names of corporations, which contains no similar provision. If there was a liability it rested upon *the rule of law that when individuals act under a corporate form and in a corporate name when there is, in fact, no corporation,* they have not thereby absolved themselves from personal liability *and are liable as partners.* Independently of section 18, a company which is not a corporate body is a partnership composed of the officers and subscribers to the articles of association. *Bigelow* v. *Gregory*, 73 Ill. 197; *Loverin* v. *McLaughlin*, 161 id. 417; *Ryerson & Son* v. *Shaw*, 277 id. 524."

This applies to an unincorporated company under the Illinois law (*Hunter* v. *Winter*, 268 Ill. App. 487, 491, and cases there cited).

IV.

A CORPORATION WHICH WAS DISSOLVED BY A JUDICIAL DECREE AND WHICH CONTINUED TO FUNCTION UNDER THE CORPORATE NAME IS NEITHER A DE FACTO CORPORATION NOR AN UNINCORPORATED COMPANY AND THE STATUS OF THE PERSONS WHO CONDUCT ITS AFFAIRS UNDER THE CORPORATE NAME IS THAT OF INDIVIDUALS WHO ARE PERSONALLY LIABLE FOR THEIR ACTS.

The opinion asks (p. 6): "If Peer Manor Building were not an 'unincorporated company or association' what was it?" The answer to this question is not determined by the fact that "it carried on business" but by the fact

that "Peer" *carried on business* under the corporate name which the State had prohibited him from using. Therefore, *the answer to the question of the court is that "Peer" was the "Peer Manor Building Corporation."*

On the former appeal (134 Fed. 2d 839), the *dissenting* opinion held that the corporation was a *de facto* corporation. The majority held that it was *not* and its decision is binding on this appeal upon the issue whether or not it was a *de facto* corporation. In fact, neither the petition for reorganization nor the opinion of this court holds that it is a *de facto* corporation. The reason is apparent. *When a corporation is dissolved by a decree of a court, it cannot continue to function as a de facto corporation.* The authorities are collected in 47 A. L. R., p. 1394. There the author says:

> "It has been laid down that 'after a corporation is dissolved by a judicial decree, or by the expiration of the period fixed for its existence in the law under which it is organized, it is not even a *de facto* corporation and its existence as a corporation may be questioned collaterally'."

Many decisions are cited under Note 1 in support of this proposition. The reasoning behind the decision is based on the point that a *de facto* corporation must have its power under *some law* and when the law has prohibited the corporation from continuing its life, it cannot exist as a *de facto* corporation. The reasoning was also adopted by our Illinois courts. (*Robinson* v. *New York Cent. R. Co.*, 283 Ill. 334.) It is evident, therefore, that the Peer Manor Building Corporation did not function as a *de facto* corporation. The "life" of the corporation ended forever and it could not be resurrected for any purpose. (*United States* v. *Safeway Stores*, 140 F. (2) 835, 836.)

(a) Upon the expiration of the two-year period from the dissolution of the corporation, the title vested in the individual stockholders not as members of an unincorporated company but as tenants in common.

Upon the dissolution of the corporation and the expiration of two years thereafter, the title to the corporate property was *not* vested in the Peer Manor Building Corporation as an unincorporated company, as *such a company may not hold title* under the Illinois law. (*Butler Mfg. Co.* v. *Dept. or Finance*, 383 Ill. 220, 228.) The title was vested in the stockholders as tenants in common. (16 Fletcher on Corporations, Permanent Edition, Sec. 8134.) While prior to the expiration of two years from the date of the dissolution, the corporation holds the title as Trustee for the benefit of the creditors and stockholders (*Crocker* v. *Commissioner of Internal Revenue*, 84 Fed. 2d 64), subsequent to the expiration of the two-year period, the stockholders are vested with the fee title, free and clear from the payment of any debts except those that are secured by a lien created prior to the dissolution. (*R. F. C.* v. *Teter*, 117 Fed. (2) 716, 7 C. C. A.)

(b) A corporation dissolved by decree of court may not conduct its business in the corporate name as an unincorporated company.

The petition in the instant case did not allege that the Peer Manor Building Corporation conducted its business as an *unincorporated* company, but on the contrary, it *alleged* (R. 2) that the corporation was dissolved by judicial decree on June 18, 1934 and (R. 3) for a long time thereafter and up to the date of the filing of the petition, the persons named therein *continued to conduct their business* in the *form and style of a "corporation."* It alleged in paragraph 8 that all of the said operations of the said

unincorporated company "were carried on and conducted *through the medium of a corporate form and style.*" The proof was that the corporate functions were performed by the Peer Manor Building Corporation, a corporation, by its President and Secretary and the *corporate seal* was attached (R. 3). It is evident therefrom that the Peer Manor Building Corporation in defiance of the decree of its dissolution and of the law of the state, *continued to conduct its business not as an unincorporated company but as a corporation.* Its status, therefore, was not that of an unincorporated company but of persons who stood in defiance of a state law who are personally liable for their acts.

The question of the status of stockholders of a dissolved corporation under the *prior* Corporation Act was discussed in *Loverin* v. *McLaughlin,* 161 Ill. 417, and there it was held that their liability was that of *partners.* This doctrine was repudiated in *Inter-Ocean Co.* v. *Robertson,* 296 Ill. 292 and the court held that under the Corporation Act, as it then existed, the stockholders were not liable, but *the officers and directors were individually liable.* It said (p. 98):

> "In the absence of an express statute declaring such liability, we hold, in harmony with the great weight of authority, such liability does not exist."

The Corporation Act was *thereafter amended* and instead of making only the directors liable, the new Corporation Act provides (Chapter 32, Sec. 157.150, Smith-Hurd Ill. Ann. Statutes, p. 420) that:

> "All persons who assume to exercise corporate powers without authority so to do shall be jointly and severally liable for all debts or liabilities incurred or arising as a result thereof."

Under this statute, if all of the stockholders conducted the business of the dissolved corporation under its corporate name, *they are jointly and severally liable.* Under no

stretch of the imagination can they be held to be members of an unincorporated company under the Illinois law.

(c) Illinois does not recognize the existence of unincorporated companies as legal entities and such companies must be sued in the name of the individuals who compose them.

At common law an unincorporated association cannot be sued under its unincorporated name, but all its members must be named as defendants. This common law exists in Illinois. No suit against an unincorporated company may be maintained in Illinois (*Moskal* v. *New Era Commercial Ass.*, 228 Ill. App. 278, 280). A suit against an unincorporated company or partnership must, under the Illinois law, be against the individual members of such companies or partnerships (*Cahill* v. *Plumbers, et al.*, 238 Ill. App. 123). *Such a company cannot hold title to realty or personalty* and the title must be in the name of the individual members, unless specially authorized by the statute (*Butler Mfg. Co.* v. *Department of Finance*, 383 Ill. 220, 228). The petition in the instant case did not sue the individuals as doing business in the name of the unincorporated society. On the contrary, it sued the Peer Manor Building Corporation and service was procured upon its registered agent (R. 10). It is true that the petition describes some individuals and corporations as the persons who composed the unincorporated company, but *the petition did not sue these persons as the bankrupts.* If the intent of the petition was to sue the individuals as the bankrupts for corporate reorganization, it would have been necessary as a jurisdictional requirement under Chapter X, Sec. 130 (1) to set forth that each individual was either insolvent or unable to pay his debts. It would have been necessary to set forth under Section 130 (3) the nature of the business of each of

the individuals and under Section 130 (4), the assets and liabilities of each of the persons or corporations who composed the unincorporated company. A glance at the petition will indicate that the proceeding was against the *unincorporated company as a legal entity.* As such, it could not be bankrupt and it could not file a petition to be reorganized nor could a proceeding be filed against it.

V.

THE DECISION IS IN CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT CONSTRUING SECTION 1(8) THAT THERE CAN BE NO UNINCORPORATED COMPANY WITHOUT SOME ACT ON THE PART OF SOME GROUP OF PERSONS TO FORM SUCH A COMPANY.

The court overlooked the all important fact that after the Peer Manor Building Corporation had been dissolved the former shareholders *in no way united or associated themselves with Peer to form a group or an entity.*

Every case cited by the court clearly shows that in order that a number of persons carrying on a business may be regarded as an association or unincorporated company, these persons must unite into some group and set up some form of organization whereby a few are designated as agents for the group to carry on the business.

It is possible for the shareholders of a dissolved corporation to continue to hold meetings, elect officers, and thereby create an unincorporated company or association, but this is because of new acts by the shareholders showing that they are united for carrying on business.

This was not the situation in the instant case.

The evidence shows that Peer signed the bond issue and constructed the apartment building. When it was finished he gave the contractors whom he could not pay cash, stock

in the corporation which he had organized to take title to the property. This accounts for companies like Midland Terra Cotta and Reliance Elevator being shareholders in Peer Manor Building Corporation. Until there was a default on the bond issue there were corporate meetings, officers elected and the corporate functions carried on. Peer was ousted from control at one time. But after the corporation got into difficulties the shareholders lost hope, and as Peer put it in his testimony, they ran out on him. There were no more meetings. There was never even a meeting of the Board of Directors to authorize the filing of the voluntary petition back in 1936. This was after the dissolution of the corporation.

Nor do we find any such united or concerted action by the shoreholders or any group of them, as would under the authorities cited by the court and the very definition of an association or unincorporated company cited in the opinion, create an association or unincorporated company of the former shareholders of the defunct Peer Manor Building Corporation.

The shareholders never met, never elected officers. After the extension of the bond issue, only Peer operated the property. He did not account to the shareholders. He made reports only to the Indenture Trustee. He conferred with no one other than Nickolas, the largest bondholder, with respect to operation of the property.

The shareholders took no steps whatsoever to bring about an entity.

The evidence produced at the hearing upon the motion to strike negatived the creation of an association by the shareholders through any acts on their part.

The finding of the District Court on this issue was binding and conclusive on the Court of Appeals (*Schwarz* v. *Witwer Grocer Co.*, 141 F. (2) 341, *supra*).

The cases cited by the court are all in which there was a going organization with officers chosen by the members thereof, active participation in the affairs, and clearly show that the basis for the holdings are that a *number* or *group* of individuals carry on business with all the attributes of a corporation.

The Court has created an entity where none existed. Although in parts of the opinion it talks about "it" having continued to do business, and "it" holding property and conducting business, etc., in another part of the opinion the Court says that Peer "speaking for the *corporation* obtained a reorganization" and *"acted as officer and as agent of the corporation and transacted its business in its corporate name."*

Since there was no corporation Peer could not act for one. His holding himself out to act for a *corporation*, when none existed, rendered only Peer personally liable under § 157.150 of the Corporation Act (Chapter 32, Sec. 157.150 Smith-Hurd Ill. Ann. Stat., p. 420, *supra*). None of the other former shareholders had designated Peer to act for them, they had not organized for any purpose of carrying on business—neither the dissolved corporation nor any entity carried on a business of renting apartments.

No act of Peer purported to be the act of an unincorporated company or association, but on the contrary all his acts were on behalf of *Peer Manor Building Corporation.* The word "company" could mean an unincorporated company, but "corporation" negatives the existence of any organization other than one duly organized under a charter from the State creating it.

Under the test laid down by the Court in the *Tide-water Coal Exchange* case, 280 Fed. 638, and cited by the Court in its opinion, the evidence clearly fails to show that there

were here "a number of persons united for performing or carrying on anything jointly."

There was no "it" that had debts, not even a mortgage indebtedness, because the bond issue was signed personally by Peer, and never assumed by the corporation, while it was in existence. The so-called extension and trust agreement purport to be the act of a *dejure corporation of Illinois* and not of an unincorporated association, and does not appear to have been authorized or ratified by the persons who are now, by the Court's opinion, made members of an association. An unincorporated company must be a *voluntary* combination of persons and cannot be created *involuntarily.* (*H. D. Still's Sons* v. *American National Bank,* 209 Fed. 749, 753.) There can be no unincorporated company without the agreement of the persons to become members thereof voluntarily and no involuntary proceeding under Chapter X may be filed against such a company.

In *Pope & Cottle Co.* v. *Fairbanks Realty Trust,* 124 Fed. (2d) 132, an involuntary petition was filed against Fairbanks Realty Trust, describing it as a "voluntary association and an unincorporated company operated by Henry Berish, and Catherine Burns, under a declaration of trust and having a place of business in Brookline, Mass." The court held that the alleged Debtor was not a corporation within the broad definition of the Chandler Act, because it was neither an unincorporated company, association, nor a Mass. Trust. With respect to "unincorporated companies" the court said (page 134):

> "In general the organizations which they (the courts) have held to be subject to involuntary bankruptcy in this category have been unincorporated associations of persons *joining together* at least in part for some common business or commercial purposes and

conducting their affairs somewhat after the pattern of corporations." (Citing cases.)

"In the category of 'unincorporated company' the courts have put some associations organized under a declaration of trust in which the interest of the shareholders were evidenced by transferable certificates similar to shares of stock in a corporation, and which *managed* their affairs not unlike the way corporations are run." (Citing cases.)

The court said that the trust did not come within the broad definition of a "corporation" under the Chandler Act because since the liability as between the trustee and the public was not limited the trust was not a "body" having any of the powers and privileges of private corporations not possessed by individuals or partners." It was not a Mass. trust because the certificates were not transferable. Finally, the court said:

"It is not an unincorporated company within any of the cases, for the beneficiaries have not *associated themselves together* for the conduct of a business with powers similar to those of stockholders as was the case in *Re: Associated Trust,* 222 Fed. 1012, and in *Re: Sargent Lumber Co.,* 287 Fed. 154. It is no more a 'company' than an ordinary trust having two or more beneficiaries. * * * Nor do we think it is an 'association' within the meaning of Sect. 1 (8)."

"We doubt very much whether the words 'and associations' add anything to the words 'unincorporated companies' used in the same phrase. The two beneficiaries have not associated themselves together in the ordinary sense. And it can hardly have been intended that the two trustees should be regarded as an association."

In the case at bar, the holding that under the facts there was an association or unincorporated company by virtue of the fact that from 1936 to 1941 one former officer Peer, unchosen by the former shareholders, operated the prop-

erty without advice, cooperation or concerted action from such shareholders is not only a misconstruction of the Bankruptcy Act, but is at variance with all the decided cases holding that voluntary united or concerted action for the purpose of carrying on a business is a requirement to the creation of an unincorporated company or association.

The petitioners in the instant case *failed to prove that the former shareholders carried on business as an unincorporated company.* They alleged that after dissolution the business was continued in the *form* and style of a corporation, and that the operations of the alleged unincorporated company "were carried on and conducted *through the medium of a corporate form and style.*" The proof was that corporate functions were performed by two officers who in defiance of the Illinois law, acted as a corporation.

The evidence showed no participation by any shareholders of the dissolved corporation in the operation of the property for more than 6 years after the dissolution. The opinion of the Circuit Court of Appeals admits that the management was turned over to Peer, who acted for the corporation and in its name. The evidence shows he managed without interference and control from any other shareholders and that at the time the present petition for reorganization was filed even he had had nothing to do with the property for almost two years, the possession having been in a federal trustee whose appointment was on the prior appeal held void.

Under this state of facts only Peer individually became liable in the absence of evidence that after the dissolution the other shareholders had designated him to act as their agent.

Even had the shareholders participated with Peer in the management of the corporation, in the absence of such

united action and the creation of a governing group as might render them an association, they would, under the present Illinois law, be liable as *partners.*

The provisions of Chapter X cited by the court show that partnerships whose members are individually liable are excluded from the section and that only where the "partnership associations" are "organized under laws making the capital subscribed alone responsible for the debts of the association," may they be proceeded against as "corporations."

In 8 C. J. S. (page 511) the author says:

> "The meaning of the word 'unincorporated' in the Bankruptcy Act 4 b (11 U. S. C. A. 21 (b)), providing that an 'unincorporated' company may be adjudged an involuntary bankrupt, is clear, but the meaning of the word 'company' is much less definite, since the Bankruptcy Act does not define an unincorporated company. It would seem to imply an association of individuals, not partners, carrying on business under a distinct name, and having common rights *inter se,* but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts. Its use in connection with the word 'unincorporated' would seem to imply that the organization should have some of the attributes usually found in corporations." (*In re Associated Trust,* (D. C. Mass.) 222 F. 1012.)

In *Burkhardt* v. *German-American Bank,* (D. C. Ohio) 137 F. 958, 960 the Court said:

> "It is difficult to conceive of an unincorporated company (as distinguished from a corporation and an ordinary partnership) without any of the powers and privileges of a private corporation, for without any of these privileges and powers it would be an ordinary partnership. It is generally understood to be a body or association occupying middle ground between partnerships and stock corporations, possessing some of the

power and privileges of both, and it is generally so recognized by the courts."

It is obvious that there was no association or company after the dissolution. The "it" which carried on business in the name of "Peer Manor Building Corporation" was Peer alone. He alone became personally liable. He obviously cannot be regarded as a corporation. McHugh did not act in concert with Peer in operating a business. Nor did any of the other shareholders. But even if they had they would have been jointly and severally liable as partners without any limitation as to liability and be excluded by the very definition of Chapter X.

The absence of limited liability was a determining factor in the court's conclusion in the *Fairbanks* case that the trust did not come within the broad meaning of a "corporation" as defined by Chapter X including unincorporated companies or associations if the bodies have "any of the privileges of private corporations not possessed by individuals or partnerships." The *Fairbanks* decision is in conflict with the decision in the instant case.

VI.

PETITIONING CREDITORS HAD THE BURDEN OF PROVING THAT THERE WAS A CORPORATION WITHIN THE MEANING OF CHAPTER X.

In order to sustain the right of petitioning creditors to institute involuntary reorganization proceedings against the dissolved Peer Manor Building Corporation, it was necessary for the petitioning creditors to prove all of the allegations of their petition and to prove that the Peer Manor Building Corporation, having been dissolved in 1934, was still a "corporation" within the meaning of Chapter X.

The District Court had held that the evidence did not

show there was not such an association or corporation amenable to being sued under Chapter X of the Bankruptcy Act. This finding could only have been disturbed on review "if clearly erroneous."

The Circuit Court of Appeals said that under the evidence the dissolved corporation was an "unincorporated company or association" within the definition of Chapter X. The pertinent section reads as follows:

> "'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument; * * *." (Title 11, Sec. 1(8) U. S. Code.)

That a dissolved corporation is incapable of acting in any capacity is well settled by the authorities. It cannot even appear by an attorney. Such attempted appearance would be a nullity. (*In re Wilcox Building Corporation*, 302 U. S. 120; *In re Peer Manor Building Corporation*, 134 Fed. 2d 839.)

A corporation of Illinois dissolved for more than two years is incapable of transacting any business whatsoever in its corporate capacity. A carrying on of business under the corporate name after dissolution does not create a corporation.

Two years after the entry of the decree of dissolution all corporate powers of Peer Manor Building Corporation were extinguished by force of the Illinois statute and it ceased to exist as a legal entity. No action could thereafter

be commenced by or against it and it was incapable of performing any corporate acts. (*Markus* v. *C. T. & T. Co.*, 273 Ill. 557; *Sarelas* v. *McCue*, 291 Ill. App. 540; *R. F. C.* v. *Teter*, 117 Fed. (2) 716 (1941).)

In *A. J. Bates* v. *United States*, 3 Fed. Supp. 245 at 248 the court said:

> "The period of limitation within which suit by creditors could be instituted against the Illinois corporation, its officers or stockholders, for any liabilities incurred previous to its dissolution, expired on February 10, 1923. From and after that date the Illinois corporation was extinct for all purposes. It was as nonexistent as if it had never been created, had no stockholders or officers, and was incapable of transacting any business whatsoever."

In *Chas. A. Zahn Co.* v. *United States* (6 Fed. Supp. 317, at 319), the court said:

> "Two years after the dissolution of the corporation, or on March 30, 1923, the Charles A. Zahn Company ceased to exist, and became incapable of transacting any business whatever in its corporate capacity. *A. J. Bates Co.* v. *United States* (Ct. Cl.) 3 F. Supp. 245. This suit filed more than six years thereafter, on May 10, 1929, cannot be maintained."

By the settled rule of this court dissolution under a state statute completely terminates corporate existence. Thereafter, federal courts will not recognize the dissolved corporation as an entity capable of engaging in litigation or otherwise exercising corporate powers. *Mumma* v. *The Potomac Co.*, 8 Pet. 281, 286; *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257.

This court decided in *In Re 4136 Wilcox Building Corporation*, 302 U. S. 120, that an Illinois corporation dissolved for more than 2 years could not institute voluntary re-

organization proceedings and followed the rule laid down by its former decisions that only a state can determine what entities it will recognize.

The same Circuit Court whose decision is here sought to be reviewed had made this rule applicable to an *involuntary* petition for reorganization filed under Chapter X against the dissolved Peer Manor Building Corporation, and had said:

> "The purported appearance and answer of the former corporation by the attorneys were a nullity. The corporation had been dead for 7 years, and was incapable of appointing attorneys or *exercising any other corporate functions.*" (134 Fed. 2d 839.)

All acts relied upon as creating an unincorporated company or association purported to be acts of a *dejure corporation,* were *nullities,* and cannot form the basis for a holding that a company or association was brought about. Void acts can create no legal consequences. Officers who purport to act for a *dejure* company negative an intention to bring about an association or unincorporated company.

The opinion of the Circuit Court of Appeals, however, gives effect to such null and void corporate acts and *creates* a corporation. In an indirect manner, the dissenting opinion in the first Peer Manor case is now given full recognition, and the former opinion which is the law in the case was not followed.

The decision of the Circuit Court of Appeals, by creating an unincorporated company of the shareholders, ignores the effect of the dissolution, and creates an entity in defiance of the law of the State of Illinois, and contrary to the constitutional principle laid down by this court in *Hopkins Federal Savings & Loan Association* v. *Cleary,* 296 U. S. 337.

VII.

THE BANKRUPTCY COURT HAD NO JURISDICTION BECAUSE THE ALLEGED DEBTOR HAD NO PROPERTY WHICH COULD BE THE SUBJECT OF REORGANIZATION UNDER CHAPTER X, AND AS AN ENTITY COULD HOLD NO TITLE UNDER ILLINOIS LAW.

It is important to bear in mind that the present proceeding was not an involuntary petition to have the respondent declared a bankrupt but one under Chapter X, which is intended to reorganize and rehabilitate a debtor by permitting it to retain the property through a plan of arrangement or readjustment of its obligations. The petition of the creditors is for reorganization of a "Debtor" not to obtain an adjudication in bankruptcy nor is it to obtain a liquidation and there can be no reorganization proceeding under Chapter X unless the debtor may be reorganized as a going concern (*Fidelity Ins. Ass.* v. *Sims*, 318 U. S. 608).

The jurisdiction conferred upon the bankruptcy court by Chapter X, would be futile unless the debtor were possessed of property upon which the elaborate machinery of administration and reorganization provided for by that Chapter could operate. It is essential, therefore, to the exercise of jurisdiction under Chapter X that the debtor have a property interest which can be the subject of reorganization.

There was no intent on the part of Congress "throwing back into the bankruptcy proceedings property which was once owned by the bankrupt and as to which his ownership and interest has been extinguished" by the law of the State (*State Bank* v. *Brown*, 317 U. S. 135, 138).

In determining whether the debtor has property and the nature and extent of that property, resort must be had to the law of Illinois. *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1, 10.

Upon the expiration of the two year period after dissolution, the Peer Manor Building Corporation became wholly incapable of owning, conveying, or otherwise dealing with the legal title which it formerly had.

By the rule prevailing in Illinois, this title then vested, *by operation of law* in the Peer Manor Bldg. Corporation's stockholders, subject to the rights of those creditors who had commenced suit within the time prescribed by the Corporation Act. *Gulf Lines R. R.* v. *Golconda Ry.*, 290 Ill. 384, 392; *RFC* v. *Teter*, 117 F. (2) 716.

The complete title could not be conveyed except by deed executed by the individual stockholders and their spouses, if any, although each shareholder might convey his interest by deed of conveyance joined in by his spouse it appears that Alice Page, who is alleged to have an interest but who is not alleged to have been a former shareholder constituting one of the members of the unincorporated company, acquired her interest in this manner.

Chapter X contemplates that a debtor be an entity capable of holding title that will pass to a trustee (*Fidelity Ins. Ass.* v. *Sims*, 318 U. S. 608, *supra*).

At the time of the filing of the petition, the Peer Manor Building Corporation, having been dissolved for more than seven years, was powerless to make a conveyance, and had no property which was capable of being levied upon. Title was in the individual stockholders and not in an entity created by the stockholders through joint action. Under the Illinois law an unincorporated association cannot hold title. In *Butler Mfg. Co.* v. *Dept. of Finance*, 383 Ill. 220, the court said:

> "We recognize the general rule that an unincorporated association does not have legal existence, independent of the members who compose it, which will permit it to take title to personal property in its own name, but the right of such association to take title

to property in its own name may be authorized by statute. (7 C. J. S. 38.)''

The petition for reorganization in the instant case is against Peer Manor Building Corporation, an unincorporated company. It names the shareholders of the dissolved corporation as the unincorporated company, but it does not sue them as individuals doing business in the name of the unincorporated company. The involuntary petition must fail because there is no such entity as Peer Manor Building Corporation, capable of holding title as an unincorporated company.

The decision of the Court of Appeals, disregarding the Illinois law, creates an entity, an unincorporated company, with the power to acquire and dispose of property which can be reorganized under the bankruptcy law and which enables it to manage and administer that property.

According to the Court of Appeals, respondent, Peer Manor Building Corporation, is an existing ''corporation'' within the meaning of Chapter X, having all powers which a corporation must have for reorganization purposes under said chapter.

Notwithstanding this, it is certainly true that under the State law, the Peer Manor Bldg. Corp. has no corporate existence, has no property capable of administration, purchase or sale, has no power to acquire such property; and is immune from capital stock taxes, franchise fees, and all of the other obligations imposed by the State of Illinois upon corporations which it creates. Such a situation is anomalous in the extreme. If there is corporate existence to permit administration of affairs under the Bankruptcy Act, there must be corporate existence sufficient, for example, to enable the State of Illinois to collect taxes from it. Yet, we submit the State of Illinois would have considerable difficulty in collecting taxes from a corporation which in its view and under its law was no longer existent.

The situation created by the decision sought to be reviewed is intolerable from another viewpoint. A creditor not having a lien created by mortgage, would have no right whatsoever to proceed in the Illinois courts against the Peer Manor Building Corporation or the property owned by it prior to its dissolution. Yet, if the same creditor elects at any time to pursue his remedy in the Bankruptcy Court jurisdiction is held to exist. The ultimate effect of the opinion of the Court of Appeals herein is to confer perpetual life upon Illinois Corporations. In every case after a corporation is dissolved some former officer continues to manage the property as Peer did in the instant case. Unless the shareholders unite and take joint action to carry on business for profit and attempt to limit their personal liability no unincorporated company or association is created. But the Court of Appeals has by its decision said that if after dissolution the dissolved corporation is alleged in the petition to be an unincorporated company, then even if the evidence shows only one or two former officers carrying on business in a corporate name without authority from the other stockholders, the dissolved corporation exists, apparently without limit in time, for the purpose of being proceeded against under Chapter X of the Bankruptcy Act.

To permit the decision to stand would create chaos to real estate titles in Illinois wherever title to the property had been held by a corporation since dissolved; for even after a lapse of 9 years from the date of dissolution, any person who had acquired title from a stockholder of the corporation would run the risk of losing it to a trustee in bankruptcy appointed in a proceeding filed against the dissolved corporation on the theory that it was an unincorporated company or association, just as Anna Page, a transferee from a stockholder runs the risk of losing her interest in the property under the liquidation plan pro-

posed by petitioning creditors. Even the petition for corporate reorganization alleged that Alice M. Page had on interest (R. 3). How could her interest be divested by the corporate reorganization? The spouse of a deceased stockholder would suddenly find herself losing her dower interest and the heirs deprived of their rights. All titles acquired by reason of the dissolution of a corporation by a decree of an Illinois court would be unmerchantable.

Moreover, the decision, if permitted to stand would deprive persons of their property without due process in violation of the 5th Amendment to the Constitution of the United States. The spouses of deceased stockholders of the Peer Manor Building Corporation have dower rights in the interest of the deceased stockholders acquired by them in the real property, upon dissolution of the corporation. Likewise the wife of any stockholder who divorced a stockholder for his fault has rights in the property. They are not before the court. They can by no stretch of the imagination be deemed associates or members of an unincorporated company. Yet by the so-called plan of reorganization approved by petitioning creditors who hold more than 60% of the first mortgage bonds, these spouses would be deprived of their rights and interest in the property.

It is important to bear in mind that the denial of relief in a Bankruptcy Court would not deprive the petitioning creditors of their rights. They hold first mortgage bonds secured by a trust deed constituting a first lien upon the property. Foreclosure proceedings are pending in the State court to foreclosure the lien of the trust deed, instituted by the Indenture Trustee for the protection of all bondholders and a receiver appointed in those proceedings was collecting the rents (R. 19). There was no allegation nor proof showing why the prior proceedings would not afford the relief, which is a jurisdictional requirement (*Marine Properties* v. *Trust Co.*, 317 U. S. 78, 84). There

was available for the secured creditors the appropriate relief in the State Court and the petition was not filed in good faith (*Fidelity Ins. Ass.* v. *Sims*, 318 U. S. 608, *supra*). The District Court properly dismissed the proceedings and the Court of Appeals clearly erred in reversing its dismissal order.

Conclusion.

We have shown that the Peer Manor Building Corporation was neither a *de facto* corporation nor an unincorporated company under the Illinois law, and that the District Court had no jurisdiction of the reorganization proceedings. We have also shown that the judgment of this court on the former appeal between the same parties was a bar to this action. It follows that the District Court properly dismissed the petition in sustaining the defense and that the Seventh Circuit erred when it reversed its order.

For the foregoing reason, we submit that the prayer in the petition for the issuance of a writ should be granted.

Respectfully submitted,

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Chicago, Illinois,
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